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BEFORE THE ARIZONA CORPORATION CC

COMMISSIONERS

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Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION OF
ARIZONA-AMERICAN WATER COMPANY,
INC. FOR A DETERMINATION OF THE
CUREENT FAIR VALUE OF ITS UTILITY
PLANT AND PROPERTY AND FOR
INCREASES IN ITS RATES AND CHARGES
BASED THEREON FOR UTILITY SERVICE
BY ITS ANTHEM WATER AND
ANTHEM/AGUA FRIA WASTEWATER
DISTRICTS.

DOCKET NO. WS-01303A-06-0403

**STAFF'S RESPONSE TO MOTION TO
OPEN THE RECORD AND SCHEDULE A
HEARING**

On March 13, 2008, the Residential Utility Consumer Council ("RUCO") and the Anthem Community Council ("Council") jointly moved for reopening the evidentiary record in the above captioned proceeding. On March 21, 2008, Arizona-American Water Company (the "Company") filed a response. RUCO and the Council replied to the Company's response on March 21, 2008. The Utilities Division Staff ("Staff") of the Arizona Corporation Commission (the "Commission") opposes the joint motion. In addition to the Company's arguments, Staff offers further argument below.

Staff addresses two issues raised in the Commission's Open Meeting on March 12, 2008. The issues were raised in deliberations for the Company's rate case involving its Sun City West Wastewater District. First, several Commissioners asked questions about actual notice to the Council. Although the Council did not intervene in the rate case for the Sun City West Wastewater District, an issue arose in that case related to the Anthem case. The issue was Staff's changed recommendation for allocating capacity of the Northwest Valley Regional Water Reclamation Facility ("Northwest Treatment Facility") between the two districts. Second, RUCO questioned whether a party may substantially change its position during the hearing phase of a rate case.

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1 Regarding notice, Staff addresses both actual notice and legal notice. Staff recognizes that the
2 Council does not routinely intervene in utility rate cases. Nevertheless, the Council has intervened in
3 rate cases for the Anthem/Agua Fria Wastewater District. The Council was represented by legal
4 counsel. Notice to the legal representative for the Council is sufficient legal notice. The Company's
5 Exhibit A in its response demonstrates actual notice of Staff's pending change to its testimony.
6 Staff's email to the Council's legal representative conclusively shows actual notice no later than
7 September 14, 2007. Staff counsel specifically informed the Council's legal representative that
8 Staff's recommended allocation would be changed.

9 Staff's engineering witness Ms. Katrin Stukov was recalled on November 1, 2007. She filed
10 an amended Engineering Report on October 3, 2007 in the above captioned proceeding. RUCO and
11 the Council received actual notice of Staff's changed recommendation (i.e. the increase from 2.25%
12 allocation to Anthem/Agua Fria Wastewater District to 32%) on October 3, 2007. Staff complied
13 with Administrative Law Judge Teena Wolfe's ("Judge Wolfe") procedural orders in this proceeding.
14 On October 5, 2006, Judge Wolfe issued the initial procedural order for this case. On page 3, lines 5
15 through 7, Judge Wolfe ordered, "IT IS FURTHER ORDERED that *any substantive corrections,*
16 *revisions or supplements* to pre-filed testimony shall be reduced to writing and *filed no later than five*
17 *days before the witness is scheduled to testify.*" (Emphasis added). Neither party argues that it did
18 not receive notice on October 3, 2007.

19 Not only did RUCO and the Council receive substantially more than five days notice, Judge
20 Wolfe offered additional due process. On October 9, 2007, she issued another procedural order.
21 Judge Wolfe first noted that Staff filed its Revised Engineering Report on October 3, 2007. (October
22 9, 2007 Procedural Order at 2, lines 19-20). Recognizing that other parties may need time to respond,
23 Judge Wolfe ordered, "IT IS FURTHER ORDERED that the parties shall file their responses, if any,
24 to late-filed exhibits, *and requests for additional hearings, if any, no later than October 24, 2007.*"
25 (*Id.* at 3, lines 7-8, emphasis added). Judge Wolfe's order is consistent with Rule 14-3-109(Q). Rule
26 14-3-109(Q) provides, "Either prior to hearing, *or during a hearing*, and on a showing of good cause,
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1 a matter may be continued by the Commission or the presiding officer for submission of
2 further or additional evidence or for any other proper purpose.” (Emphasis added).

3 Neither RUCO nor the Council requested additional hearing days in accordance with Judge
4 Wolfe’s order. On October 31, 2007, Judge Wolfe further queried RUCO regarding discovery related
5 to Staff’s changed recommendation. (TR: Vol. VII, 1018-1021). RUCO conducted no discovery
6 with Staff between October 3, 2007 and October 31, 2007. RUCO and the Council have conducted
7 no discovery to date on the allocation. Lack of due diligence by a party is an insufficient reason to
8 reopen a closed record. Both RUCO and the Council rested their cases notwithstanding an invitation
9 by the presiding officer to provide further hearings. Reopening the record at this point in the process
10 does not satisfy the requirements of Rule 14-3-109(Q).

11 In RUCO’s Reply to the Company’s Response, RUCO claims that Staff’s recommendation
12 amounts “to a bald conclusion that the ‘NEAF service area will account for 32 percent of the total
13 flows’ of the NWVTF at build out based on the ‘Company’s agreement’ during the Sun City West
14 Wastewater case.” RUCO Reply at 2, lines 14-17. Staff did not recommend a “bald conclusion”
15 regarding use of the plant. Staff provided written and oral testimony subject to cross examination.
16 Staff’s rationale was fully vetted in the hearings.

17 Staff’s recommendation was not based on the Company’s agreement. Staff would have made
18 the same recommendation with or without the Company’s agreement. Finally, Staff’s
19 recommendation was based on evidence that eliminated uncertainty for future uses of the Northwest
20 Treatment Facility. The Sun City West Wastewater District is very nearly built out. The district is
21 entirely land locked. Accordingly, future use of the plant not currently used will necessarily be for
22 the Anthem/Agua Fria Wastewater district. Ms. Stukov’s engineering conclusions for future growth
23 are not “bald conclusions.” They are based on known and measurable facts in evidence.

24 Specific notice to the Council in the rate case for the Sun City West Wastewater District was
25 not required. The Council did not intervene in that case; therefore it was not entitled to specific
26 notice of Staff’s changed position in that case. However, the Council received constructive notice of
27 the allocation issue in that district through publication on March 21, 2007. The legal notice provided
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1 notice of the Company's entire application. The allocation was identified in the applications for both
2 rate cases.

3 The applications had an allocation between the Company's Sun City West Wastewater
4 District and its Anthem/Agua Fria Wastewater District for the Northwest Treatment Facility. The
5 Council could have intervened in the Sun City West Wastewater case to preserve its rights. It also
6 could have requested additional hearing days after the close of the evidentiary record on September 5,
7 2007. Judge Wolfe was the hearing officer in both cases and was aware of the Council's potential
8 dilemma. Again, the Council chose not to act to preserve its legal rights.

9 In addition to Judge Wolfe's procedural orders, two Commission rules are on point. Rule 14-
10 3-109(G) states that, "Once a party has rested his case he shall not be allowed to introduce further
11 evidence without consent of the presiding officer." RUCO and the Council do not argue that Judge
12 Wolfe denied Staff an opportunity to change its recommended allocation. Accordingly, Staff
13 properly presented its changed recommendation. RUCO and the Council were also presented an
14 opportunity to present a rebuttal case in the October 9, 2007 procedural order. They chose not to do
15 so.

16 Finally, Rule 14-3-109(M) does not prohibit changes to pre-filed testimony. The rule simply
17 allows a hearing officer to order pre-filed testimony to save hearing time. The purpose of the rule is
18 judicial economy. Judicial economy is an important reason to deny the request to reopen. An even
19 more important reason is waiver.

20 The law is well settled that "procedural defects are waived if not raised and preserved in the
21 trial court." (*Medina v. Arizona Dept. of Transportation*, 185 Ariz. 414, 418, 916 P.2d 1130, 1134
22 (Ariz.App.1996)). Although RUCO and the Council argued that Staff substantially changed its
23 position at the eleventh hour, they did nothing to comply with Judge Wolfe's orders. Nevertheless,
24 the claim of procedural defects is misplaced. Staff complied with all of Judge Wolfe's orders and
25 followed her written orders in making its change. Therefore, there were no procedural defects in this
26 case.

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1 RUCO and the Council should not now benefit from their lack of due diligence. Staff has
2 limited resources and cannot continually retry cases that have already been fully vetted. Reopening
3 this case will continue the slide down a slippery slope. If cases are continually litigated because a
4 party doesn't agree with the results, scarce State resources will be wasted. It is time to move away
5 from this wasteful process.

6 Staff respectfully requests the motion be denied for the reasons stated above. Staff also
7 recognizes that the Commission needs a complete evidentiary record to make its decision. The
8 record in this case will support any policy decision by the Commission. However, Staff presented the
9 only qualified witness on the narrow factual issue of allocation.

10 Ms. Stukov testified that the entire Northwest Treatment Facility is used and useful. Ms.
11 Stukov's testimony was not rebutted by a qualified witness. RUCO and the Council have waived
12 their legal rights to rebut Staff's recommendations with new evidence. No further process is
13 necessary or appropriate prior to Judge Wolfe issuing a recommended opinion and order for the
14 Commission's consideration.

15 RESPECTFULLY SUBMITTED this 25th day of March 2008.

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26 Original and thirteen (13) copies
27 of the foregoing filed this 25th day
28 of March 2008 with:

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